

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DAVID R. BULLER)	
Claimant)	
VS.)	
)	Docket No. 177,894
SAMARITAN HOME)	
Respondent)	
AND)	
)	
CNA INSURANCE COMPANIES)	
Insurance Carrier)	

ORDER

The claimant appealed the Award dated May 2, 1997, entered by Special Administrative Law Judge Douglas F. Martin. On October 29, 1997, the Appeals Board heard oral argument.

APPEARANCES

Patrick R. Nichols of Topeka, Kansas, appeared for the claimant. Kip A. Kubin of Overland Park, Kansas, appeared for the respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award. Also, the parties agreed at oral argument before the Appeals Board that the record includes the deposition of Nicole Clayton Sawyer dated April 7, 1995.

ISSUES

On the date of claimant's accident, Kansas law provided that injuries resulting "substantially from the employee's intoxication" or "substantially caused by the employee's use of any drugs" were not compensable under the Workers Compensation Act. The Special Administrative Law Judge found claimant's intoxication was a substantial cause of his accident and, therefore, denied benefits under K.S.A. 1992 Supp. 44-501(d). Claimant

appealed and contends the respondent and its insurance carrier failed to prove he was intoxicated when the accident occurred.

Claimant argues (1) that the respondent and its insurance carrier failed to prove the causal relationship between the alleged intoxication and accident, (2) the Special Administrative Law Judge "confused the presence of alcohol with the existence of intoxication," and (3) the Special Administrative Law Judge erroneously considered a physician's opinion of claimant's blood alcohol based solely on a report introduced by a records custodian rather than a health care provider.

The only issues before the Appeals Board on this appeal are:

- (1) Did the respondent and its insurance carrier prove claimant was intoxicated on October 15, 1992, at the time of his accident?
- (2) If so, did they prove that claimant's intoxication substantially caused the accident?

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds as follows:

- (1) In October 1992, the claimant, David R. Buller, was the administrator for the respondent, Samaritan Home.
- (2) On October 15, 1992, while returning home from a health care conference in Manhattan, Kansas, Mr. Buller was injured in a car wreck. The parties have stipulated that the accident arose out of and in the course of employment with Samaritan Home.
- (3) Mr. Buller does not claim permanent disability as the result of the accident. But he does request an award for the \$82,627.25 in medical expense that he has incurred.
- (4) After leaving the seminar on the date of accident, Mr. Buller stopped at a deli in Manhattan and ate dinner with a friend. He arrived at the deli shortly after 5 p.m. While there, he ate a sandwich and drank two glasses of beer and one mixed drink.
- (5) Sometime between 7 and 7:30 p.m., Mr. Buller left the deli for his home in Lawrence, Kansas. His last memory before the accident is exiting the interstate highway at Topeka and driving on Stull Road towards Lawrence. He next remembers trying to escape from the rehabilitation hospital where he was taken approximately two weeks after the accident.

(6) As a result of the accident, Mr. Buller was temporarily and totally disabled for a total of 11 weeks.

(7) The record does not address how the accident occurred.

(8) Samaritan Home and its insurance carrier presented the testimony of Curtis D. Klaassen, Ph.D., a professor of pharmacology and toxicology at the University of Kansas Medical Center. He reviewed various records, including laboratory records from Stormont-Vail Regional Medical Center, and concluded that Mr. Buller's blood alcohol concentration was approximately .24 percent at the time of the accident, a concentration that would require more than a 12-pack of beer to be consumed within a short period of time. Therefore, the doctor concluded Mr. Buller was extremely intoxicated and impaired at the time of the accident and that the intoxication was a major factor in the accident.

(9) Dr. Klaassen's opinions were based entirely upon blood tests administered by Stormont-Vail Hospital and his opinion is directly dependent upon the accuracy of those tests. He, however, is unable to establish the reliability of those tests and can only assume the hospital followed the proper procedure in taking and testing the blood.

(10) Mr. Buller presented the testimony of Richard E. Jensen, Ph.D., an analytical chemist and toxicologist from Minneapolis, Minnesota. He has taught courses in forensic science and when he was employed with the State of Minnesota Crime Lab, taught law enforcement officers how to use breath testing equipment. Dr. Jensen reviewed the same records that Dr. Klaassen used in his analysis. According to Dr. Jensen, those records do not establish that proper procedures were utilized when the blood samples were taken so as to obtain accurate and reliable data.

(11) Dr. Jensen questions the data in the Stormont-Vail lab test as it is inconsistent with the other evidence in the case. First, it is inconsistent with the testimony of both Mr. Buller and Ron Lackey that Mr. Buller drank only two beers and one mixed drink at the deli. Second, he believes it is improbable for anyone to drink 12 to 13 beers in an hour as Dr. Klaassen has suggested. Dr. Jensen also identified and explained other potential problems with the lab results such as human error, the potential for artificially high results in testing serum rather than whole blood, and the potential for artificially high results when a trauma victim is administered lactated ringers such as those Mr. Buller received.

(12) Considering the amount of alcoholic beverage drank as identified by Mr. Buller and Mr. Lackey, Dr. Jensen concluded that Mr. Buller had a .01 to .02 percent blood alcohol content by weight when the accident occurred.

CONCLUSIONS OF LAW

(1) The Workers Compensation Act is to be liberally construed to bring both employers and employees within its provisions. K.S.A. 1992 Supp. 44-501(g).

(2) Workers compensation statutes are to be liberally construed to effect legislative intent and award compensation to a worker where it is reasonably possible to do so. Kinder v. Murray & Sons Construction Co., Inc., Docket No. 76,296 (Kan. 1998).

(3) After a worker meets the burden of proof establishing the right to workers compensation benefits, the burden of proving a defense to the claim shifts to the employer. Poole v. Earp Meat Co., 242 Kan. 638, 750 P.2d 1000 (1988).

(4) To defeat a workers compensation claim based upon a worker's intoxication, an employer must prove not only that the worker was intoxicated but also that such intoxication was the substantial cause of the injury. K.S.A. 1992 Supp. 44-501(d); Kindel v. Ferco Rental, Inc., 258 Kan. 272, 899 P.2d 1058 (1995); and Poole.

(5) The Appeals Board finds that the Samaritan Home and its insurance carrier failed to prove that Mr. Buller was intoxicated at the time the accident occurred. That conclusion is based on the persuasive testimony of Dr. Jensen that raises significant questions whether the blood testing and lab results from Stormont-Vail are in this instance reliable. As the evidence indicates, the medical records are silent as to whether the proper procedures were utilized in performing the blood tests and whether the lactated ringers and other pertinent factors were considered when performing the analysis.

(6) The evidence here is strikingly different from that in Poole where the coroner drew blood with a syringe used for the express purpose of withdrawing blood specimens for alcohol testing and where the blood sample was sent to the state's forensic toxicologist, who regularly tested blood samples from traffic accidents.

(7) Samaritan Home and its insurance carrier have failed to prove that intoxication was a substantial cause of the accident. The facts concerning the accident are unknown. We do not know whether the accident occurred due to mechanical failure, a highway defect, another vehicle, an animal in the road, or some other reason totally unrelated to the driver.

(8) Mr. Buller is entitled to receive an award for 11 weeks of temporary total disability benefits and the medical expense incurred for treatment of the injuries resulting from the October 15, 1992, accident.

(9) Although the Stormont-Vail Hospital blood tests are not properly admissible as part of the evidentiary record without a proper foundation being laid, for this date of accident the tests may be considered by a physician for purposes of rendering his or her opinion as to the injured worker's condition. Boeing Military Airplane Co. v. Enloe, 13 Kan. App. 2d 128, 764 P.2d 462 (1988), *rev. denied* 244 Kan. 736 (1989). If this accident had occurred after June 30, 1993, the lab test results would clearly not be admissible without the foundation now required by K.S.A. 44-501(d)(2).

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award dated May 2, 1997, entered by Special Administrative Law Judge Douglas F. Martin should be, and hereby is, reversed; that Mr. Buller is entitled to workers compensation benefits for the October 15, 1992, accident.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, David R. Buller, and against the respondent, Samaritan Home, and its insurance carrier, CNA Insurance Companies, for an accidental injury which occurred October 15, 1992, for 11 weeks of temporary total disability compensation at the rate of \$299 per week, making a total award of \$3,289, which is presently due and owing in one lump sum less any amounts previously paid.

Respondent and its insurance carrier are ordered to pay as authorized medical benefits the medical expense incurred by Mr. Buller for treatment of the injuries he received in the October 15, 1992, accident. Claimant may request additional medical care upon proper application to the Director. Additionally, respondent and its insurance carrier are ordered to pay or reimburse Mr. Buller up to \$350 for unauthorized medical expense upon presentation of proof of payment.

Respondent and its insurance carrier are assessed the administrative costs of this proceeding as set forth in the Award.

IT IS SO ORDERED.

Dated this ____ day of May 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Patrick R. Nichols, Topeka, KS
Kip A. Kubin, Overland Park, KS
Douglas F. Martin, Special Administrative Law Judge
Philip S. Harness, Director